Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1998

FERMIN C. PEREZ,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari
to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

S. JONATHAN YOUNG
Attorney at Law
177 N. Church Avenue
Tucson, AZ 85701-1125
(520) 628 7777

16 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Mr. Perez's Lack of Notice of the Pretrial Evidentiary Hearing in this Case Denied Him the Right to Confront Witnesses Against Him, Denied Him His Due Process Right to Be Present at All Stages of the Proceedings and Denied Him the Right to Effective Assistance of Trial Counsel?

Whether Arizona May Limit a DUI Suspect's Right to Consult an Attorney to Include Only Telephone Consultation Rather than Face to Face Communication?

TABLE OF CONTENTS

Questions Presented for Review ii

Table of Contents iii

Table of Cited Authorities iv

Statement of the Basis for Jurisdiction in this Court 1

Constitutional Provisions Involved in this Case 1

Statement of the Case Setting Out Facts Material to a Consideration of the Question Presented 1

Argument

Mr. Perez's Lack of Notice of the Pretrial Evidentiary Hearing in This Case Denied Mr. Perez the Right to Confront Witnesses Against Him, Denied Mr. Perez His Due Process Right to be Present at All Stages of the Proceedings and Denied the Right to Effective Assistance of Counsel 4

Arizona May Not Limit a DUI Suspect's Right to Consult an Attorney to Include Only Telephone Consultation Rather than Face to Face Communication 7

TABLE OF CITED AUTHORITIES

CASES:

Brosan v. Cochran,
307 Md. 662, 669, 516 A.2d 970 (1986) 9

Ching v. Lewis,
895 F.2d 608 (4th Cir. 1989) 8

Hopt v. Utah,
110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884) 7

Illinois v. Allen,
397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) 7

Kentucky v. Stincer,
484 U.S. 730, 107 S.Ct. 26, 96 L.Ed. 631 (1987) 7

Kunzler v. Superior Court,
154 Ariz. 568, 744 P.2d 669 (1987) 4

Lewis v. United States,
146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 262 (1884) 7

McNutt v. Superior Court,
133 Ariz. 7, 648 P.2d 122 (1982) 9

People v. Gursey,
2d 224, 239 N.E.2d 351,
292 N.Y.S.2d 416, (1968) 8, 9

Seattle v. Box,
29 Wash. App. 109, 627 P.2d 584 (1981) 8

State v. Juarez,
161 Ariz. 76, 775 P.2d 1140 (1989) 4

State v. Kneisl,
312 Minn. 281, 251 N.W.2d 645 (1977) 8

United States v. Janis,
820 F. Supp. 512, 517 (S.D. CA 1992) 8

CONSTITUTIONAL PROVISIONS:

U.S. Const., Amdt. 5 ..... 1, 7

U.S. Const., Amdt. 6 1

U.S. Const., Amdt. 14 1

STATUTES:

UNITED STATES CODE

28 U.S.C. 1257 1

UNPUBLISHED OPINIONS AND ORDERS ENTERED IN THIS CASE:

State of Arizona v. Fermin C. Perez, slip op. No. 2 CA-CR 97-0185 (March 31, 1998), *review denied* CR-98-0244-PR (October 14, 1998)

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The Supreme Court of Arizona entered an order denying Mr. Perez's Petition for Review from a Direct Appeal on the 14th day of October, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257. As he did below, Mr. Perez here asserts the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

U.S. Const. , Amdt. 5

. . . nor be deprived of life, liberty, or property without due process of law . . .

U.S. Const. , Amdt. 6

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

U.S. Const. , Amdt. 14

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE SETTING OUT FACTS MATERIAL TO A CONSIDERATION OF THE QUESTION PRESENTED

On August 29, 1996, an evidentiary hearing on a pretrial motion to dismiss felony DUI charges was held in Mr. Perez's absence. Mr. Perez was absent only because his trial attorney failed to notify him of the hearing. Mr. Perez's case was prejudiced by his absence because the arresting officer testified at the hearing to facts which were not reflected in his report, which were contradicted by

the officer's pretrial interview, and which would have been contradicted by Mr. Perez's testimony, had Mr. Perez been present. He was also prejudiced by his absence because his trial attorney was not aware that he spent over an hour in a holding cell before being booked and that he was not, therefore, able to use the phone in booking immediately after his arrest as the officer had testified.

On September 21, 1993, at approximately 1:05 a.m. or shortly thereafter, Deputy Todd Greene stopped Mr. Perez for speeding near Craycroft Road and Sunrise Drive in Tucson, Arizona. (RT August 29, 1996, p. 5-11.) Following field sobriety tests, Mr. Perez was placed under arrest at 1:25 a.m. (RT August 29, 1996, p. 11.) After being advised of his Miranda rights, Mr. Perez stated, according to Deputy Greene's testimony, "I want an attorney right now, Harold Hyams." He then stated, according to Deputy Greene, "I want an attorney before I do any tests right now." (RT August 29, 1996, p. 12.)

Rather than making arrangements for Mr. Perez to contact an attorney, Deputy Greene continued his investigation, inquiring as to whether Mr. Perez would submit to a chemical test. Mr. Perez agreed to take a blood test and, according to Deputy Greene's testimony, stated "I want an attorney present while I do the test" while in route to El Dorado Hospital at approximately 1:30 a.m. Deputy Greene testified that he advised Mr. Perez "that he was not permitted to have an attorney present during the testing and he could make a call to an attorney." Deputy Greene also testified that Mr. Perez "insisted that he have an attorney present at the test." (RT August 29, 1996, p. 14.) Because Mr. Perez insisted on having an attorney present at the test, and because Deputy Greene felt that Mr. Perez did not have the right to have an attorney present, Deputy Greene treated Mr. Perez's insistence as a refusal to complete a chemical test. (RT August 29, 1996, p. 14.)

Deputy Greene arrived at the Pima County Jail with Mr. Perez at approximately 1:45 a.m. Mr. Perez was read the Implied Consent Affidavit at the Pima County Jail. Following that reading he stated "I want an attorney present right now." Deputy Greene also noted on the affidavit that Mr. Perez "would not do test without one." (RT August 29, 1996, p. 16.) Deputy Greene testified that he made no

arrangements at the Pima County Jail for Mr. Perez to contact an attorney. (RT August 29, 1996, p. 16.) According to the Pima County Jail booking form, Mr. Perez was ultimately booked by jail personnel at 2:47 a.m. (ROA 292.) When asked by counsel for the state whether he had ever offered Mr. Perez an opportunity to make a phone call to an attorney, Deputy Greene stated "not while I was at Pre-Trial Services. I honestly don't recall." (RT August 29, 1996, p. 19.) On redirect by counsel for Mr. Perez, Deputy Greene admitted that time had not yet become a problem with respect to a chemical test. At that point Deputy Greene claimed that he had offered to allow Mr. Perez to call an attorney but that Mr. Perez wanted to have an attorney present. (RT August 29, 1996, p. 21.)

Mr. Perez, having not received notice of the evidentiary hearing, was not present at the hearing when Deputy Greene made that claim. Had Mr. Perez been present, he would have testified that, at no time, did Deputy Greene ever offer to allow him to use the telephone. (ROA at 291; RT March 3, 1997, p. 6-7.) Upon further cross-examination by counsel for Mr. Perez, Deputy Greene was forced to admit that he had not mentioned offering Mr. Perez the opportunity to use the telephone in his police report or in an interview conducted on August 21, 1996. (RT August 29, 1996, p. 22.) During the interview, when asked what opportunity he had provided Mr. Perez to contact an attorney, Deputy Greene replied "well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, p. 29.)

Mr. Perez was not at the hearing held August 29, 1996, solely because he had not received notice of the hearing. (RT March 3, 1997, p. 3.) Mr. Perez's calendar for 1996 showed no notation of a hearing on August 29. Mr. Perez and his wife, Betty Perez, both testified that they reviewed their file of documents in this case and found no notice of the August 29 hearing from trial counsel. (RT March 3, 1997, p. 3-5, 12.)

Mr. Perez raised the federal question of his lack of notice of the pretrial evidentiary hearing, citing federal authorities, in his February 17, 1997, request for hearing to determine voluntariness of absence from evidentiary hearing (Appendix to Petition for Certiorari,

p. xlvii), which was denied by minute entry dated March 10, 1997. (Appendix to Petition for Certiorari, p. xxxi.) It was raised on direct appeal in his opening brief filed September 15, 1997 (Appendix to Petition for Certiorari, p. xv), and denied on the merits by memorandum decision dated March 31, 1998. (Appendix to Petition for Certiorari, p. xiii.) It was presented to the Arizona Supreme Court by Petition for review filed March 12, 1998. (Appendix to Petition for Certiorari, p. iv.) Review was denied by order of the Arizona Supreme Court dated October 14, 1998. (Appendix to Petition for Certiorari, p. iii.)

Mr. Perez raised the federal question of the denial of his right to consult in person with an attorney by motion to suppress/dismiss filed August 16, 1996 (Appendix to Petition for Certiorari, p. cxxvi), by motion to reconsider/dismiss filed December 4, 1996 (Appendix to Petition for Certiorari, p.lxviii), and by motion to vacate judgement filed February 19, 1997. (Appendix to Petition for Certiorari, p. xlvii.) It was denied by the trial court at the evidentiary hearing held August 29, 1996 (Appendix to Petition for Certiorari, p. lxxxvi), at the hearing on the motion to reconsider held December 4, 1996 (Appendix to Petition for Certiorari, p. lxviii), and by minute entry on March 10, 1997. (Appendix to Petition for Certiorari, p. xxxi) It was raised o direct appeal in the opening brief filed September 15, 1997 (Appendix to Petition for Certiorari, p. xv), and denied on the merits by memorandum decision dated March 31, 1998. (Appendix to Petition for Certiorari, p. xiii.) It was presented to the Arizona Supreme Court by petition for review filed May 12, 1998. (Appendix to Petition for Certiorari, p. iv.) Review was denied October 14, 1998.(Appendix to Petition for Certiorari, p. iii.)

ARGUMENT

MR. PEREZ'S LACK OF NOTICE OF THE PRETRIAL EVIDENTIARY HEARING IN THIS CASE DENIED MR. PEREZ THE RIGHT TO CONFRONT WITNESSES AGAINST HIM, DENIED MR. PEREZ HIS DUE PROCESS RIGHT TO BE PRESENT AT ALL STAGES OF THE PROCEEDINGS AND DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Mr. Perez was not present at the evidentiary hearing held in this matter on August 29, 1996, solely because he did not receive notice of the hearing date.[1] Because of his involuntary absence from the hearing, Mr. Perez was unable to confront the witness, Deputy Green, he was unable to rebut the testimony of Office Green and he was unable to assist his trial counsel in further cross-examining Deputy Green.

Deputy Green offered two critical pieces of testimony which Mr. Perez was unable to confront or to rebut. The first was Deputy Green's testimony that Mr. Perez had the opportunity to request one phone call from jail personnel when he was booked into the Pima County Jail. (RT August 29, 1996, p. 16.) Had Mr. Perez been present at the evidentiary hearing, he would have pointed out to trial counsel that Deputy Green left him at the Pima County Jail in a holding cell and it was well over an hour before jail personnel removed him from the holding cell for booking, a fact easily verified by reference to Mr. Perez's booking sheet which shows him being booked into the Pima County Jail at 2:47 a.m.

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1 While a letter may have been sent to Mr. Perez, neither he nor his wife ever received it, it is not in the file he and his wife have kept, and it is not reflected in his 1996 calendar. Furthermore, the letter does not indicate that there will be witness testimony nor does it indicate that Mr. Perez should be present. (Defense Exhibit "B" 3/3/97.)

Furthermore, both Kunzler, 154 Ariz. 568, 744 P.2d 669 (1987) and State v. Juarez, 161 Ariz. 76, 775 P.2d 1140 (1989), allow the accused to consult an attorney before deciding to take a chemical test. By the time Mr. Perez was booked, Deputy Green had advised him of his license suspension for refusal to take a chemical test, completed his paperwork and left the jail. Judge Donfeld obviously was not informed that the license suspension had already been served and the investigation completed by the time that Mr. Perez was booked as Judge Donfeld commented during argument that Mr. Perez could have elected the breath test while at Pre-Trial Services. (RT August 29, 1996, at p. 29-30.) Had Mr. Perez been advised of the hearing date, he could have pointed this fact out to counsel.

Most damaging to Mr. Perez was Deputy Green's surprise testimony, in Mr. Perez's absence, that he had offered Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) Although Deputy Green quoted Mr. Perez's exact words in requesting an attorney at several points in his police report (RT August 29, 1996, p. 13, 16.), Deputy Green never mentioned in his police report offering a phone call to Mr. Perez or Mr. Perez refusing a phone call. (RT August 29, 1996, at p. 22.) When interviewed by trial counsel, Deputy Green made no mention of offering Mr. Perez a phone call. (RT August 29, 1996, at p. 22.) In fact, when asked during the interview "and what opportunity did you provide him to contact this attorney?" Deputy Green replied "Well, at that point, I took him to jail because he said earlier while we were in the vehicle, he said, I want an attorney before I take any tests of my blood." (RT August 29, 1996, at p. 29.)

During examination by trial counsel, Deputy Green stated that, after the first request for an attorney, what he did next was to ask Mr. Perez if he would submit to a chemical test. (RT August 29, 1996, at p. 12.) After the next request for an attorney Deputy Green stated that what he did was to tell Mr. Perez that he was not permitted to have an attorney present during the testing. (RT August 29, 1996, at p. 14.) When questioned by trial counsel as to what opportunities he gave Mr. Perez to contact an attorney, Office Green testified he had no opportunity at the scene to let Mr. Perez contact an attorney. (RT August 29,1 996, at p. 14.) He also testified that, while he was

driving past public telephones, he did not stop to let Mr. Perez use the telephone. (RT August 29, 1996, at p. 14-15.) When the court inquired as to whether Mr. Perez was given the opportunity to call an attorney at the jail, Deputy Green still had no recollection of offering to allow Mr. Perez to call an attorney and stated that the jail personnel would allow one phone call. (RT August 29, 1996, at p. 16.) During examination by the prosecutor, Deputy Green was asked:

> Q: At any time post-arrest, did you offer the defendant an opportunity to make a phone call to an attorney?
>
> A: Not while I was at Pre-Trial Services. I honestly don't recall.

(RT August 29, 1996, at p. 19.) After trial counsel for Mr. Perez established that Deputy Green was under no time pressure to complete the chemical tests within 2 hours and phone calls would have taken 5 to 10 minutes that Deputy Green suddenly recalled offering Mr. Perez the opportunity to call an attorney. (RT August 29, 1996, at p. 21.) (Even so, Deputy Green's testimony was that Mr. Perez wanted an attorney present and Deputy Green did not think that Mr. Perez had the right to have an attorney present. Even by Deputy Green's newly recovered memory, Mr. Perez's right to counsel was denied.) Deputy Green subsequently lost his newly recovered memory after the evidentiary hearing, testifying at the first trial that he gave Mr. Perez an opportunity to use the phone only by taking him to jail:

> Q. What opportunity did you give him at any time to contact an attorney?
>
> A. I informed him that phones were available at pretrial services for him to make a phone call if pretrial would allow that.

(R.T. September 6, 1996, p. 72)

Given the previous inconsistencies in Deputy Green's testimony, reports and interview, given the sudden motive to fabricate upon being pinned down as to the lack of any time pressure, and given Deputy Green's failure to recollect the crucial issue during his interview or in his police report, Deputy Green's deception of Judge Donfeld is readily apparent. Had Mr. Perez been present at the evidentiary hearing, Mr. Perez would have testified that, at no point, did Deputy Green ever offer him the opportunity to make a phone call. (R.T. March 3, 1997, p. 6-7.)

The right of a defendant charged with a felony to be personally present in the courtroom at every stage of his trial conducted is fundamental to our system of justice. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892). This principle has been constantly upheld and continually reaffirmed. Hopt v. Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262 (1884); Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); Kentucky v. Stincer, 482 U.S. 730, 745, 107 S.Ct. 26, 58, 96 L.Ed.2d 631 (1987). The right to be present at every stage of trial is protected by the due process and confrontation clauses of the Fifth and Sixth Amendments to the United States Constitution.

ARIZONA MAY NOT LIMIT A DUI SUSPECT'S RIGHT TO CONSULT AN ATTORNEY TO INCLUDE ONLY TELEPHONE CONSULTATION RATHER THAN FACE TO FACE COMMUNICATION

Other states which have considered this issue have held that a DUI suspect has the right to consult an attorney in person following arrest:

> "Law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone

> communication, if such access does not interfere unduly with the matter at hand." (Emphasis added.)

People v. Gursey, 22 N.Y.2d 224, 227, 239 N.E.2d 351, 352, 292 N.Y.S.2d 416, 418 (1968).

Maryland has interpreted that identical language to permit face to face consultation:

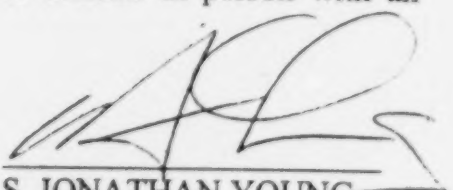
> "Nor is the constitutional right to counsel in any event limited solely to lawyer-telephonic communication, as the superintendent further contends. In no way do we limit mode of lawyer-client communication in Sites or otherwise differentiate between telephone and face to face consultation. Indeed, we quoted with approval from a New York Court of Appeals case [the same quoted in McNutt] which involved, as here, the right of a drunk driver suspect to counsel prior to deciding whether to submit to the sobriety test 'law enforcement officials may not, without justification, prevent access between the criminal accused and his lawyer, available in person or by immediate telephone communication, if such access does not interfere unduly with the matter at hand...' Sites, supra, at 1713, 41 A.2d 192 (quoting People v. Gursey, 22 N.Y.2d 224, 292 N.Y.Sd 416, 418, 239 N.E.2d 351, 352 (1968))."

Brosan v. Cochran, 307 Md. 662, 669, 516 A.2d 970 (1986).

See also, State v. Kneisl, 312 Minn. 281, 251 N.W.2d 645 (1977) ("[I]t would be a sham to permit the telephone to call and then deny the [DUI] arrested person an opportunity to consult with his attorney at the jail."); Seattle v. Box, 29 Wash. App. 109, 627 P.2d 584 (1981) (Once a defendant arrested and charged with driving under the influence of intoxicating liquor has made telephone contact with an attorney the police may not, without reasonable justification, prevent the attorney from making personal contact with the defendant.); Ching v. Lewis, 895 F.2d 608, (9th Cir.1989) (attorney-

prisoner communication by telephone, by mail, or even a hole through in the glass is not effective.); United States v. Janis, 820 F. Supp. 512, 517 (S.D. CA 1992) ("the court orders that the metropolitan correctional center allow Janis to conduct private, in-person consultations with his attorneys and in all pending litigation and with the court appointed investigator working on the criminal case pending in this district.").

Arizona has, in McNutt v. Superior Court, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982), adopted the holding in People v. Gursey, supra, regarding the right of a DUI suspect to consult an attorney. Arizona has, however, declined in this case to permit that consultation to be in person. There is a resulting split between Arizona and New York, Maryland, Minnesota and Washington, with all of the other states extending a DUI suspect the right to consult in person with an attorney.



S. JONATHAN YOUNG
Attorney at Law
177 N. Church Avenue
Tucson, AZ 85701-1125
(520) 628 7777